82-707

Office - Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Carriers regularly file with the Interstate Commerce Commission new tariffs representing millions of dollars in revenues. In the past, the Commission examined new tariff sheets prior to their taking effect to ensure that they met formal requirements. If a tariff sheet did not, the Commission rejected the tariff prior to its effective date, allowing the carrier to publish and refile a corrected tariff. The courts of appeals have previously held that the ICC—and similar agencies—may not exercise rejection powers over a tariff *after* it has become effective. * And this Court has held that an effective tariff rate may not be treated as non-existent because of a carrier's failure to comply with some tariff filing formality, thereby rendering the carrier strictly liable to refund to shippers freight charges they have paid, without regard to whether the shippers have suffered any actual harm. **

Against this background, the questions presented by this case are as follows:

1. Whether, contrary to prior decisions of the Courts of Appeals for the District of Columbia and Eleventh Circuits, the court below erroneously concluded that the Interstate Commerce Commission may reject retroactively tariff rate increases that have become fully effective in accordance with the Interstate Commerce Act's provisions but that are subsequently found not to

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* *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 676 F.2d 1374 (11th Cir. 1982); *Delta Air Lines, Inc.* v. *CAB*, 543 F.2d 247 (D.C. Cir. 1976).

** *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924); *Berwind-White Coal Mining Co.* v. *Chicago & E.R.R.*, 235 U.S. 371 (1914).

bear technical symbols prescribed by Commission regulation.

2. Whether, in disregard of controlling decisions of this Court, the court below erroneously concluded that the Interstate Commerce Commission may treat an effective but missymbolized tariff rate increase as though it never existed and obligate carriers to refund the full amount of the increase to shippers without any showing that the shippers have suffered any actual harm. ***

*** In addition to the parties named in the caption, the other parties to the proceeding in the court below were the railroads of the United States listed in Appendix A and the National Motor Freight Traffic Association, Inc. Appendix A also contains a listing of parent companies, subsidiaries, and affiliates.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, the railroads of the United States listed in Appendix A ("the petitioners"),[1] request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, which is reported at 682 F.2d 1092, appears as Appendix B. It sustained a new Interstate Commerce Commission regulation that was adopted by a Commission decision and order dated August 14, 1980, which is reported at 364 I.C.C. 217 and appears as Appendix C, and a Commission decision and order dated June 10, 1981, which is reported at 365 I.C.C.

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[1] The appendices, which are printed in a separate volume, are cited as "Pet. App. ____."

43 and appears as Appendix D. The Commission's new regulation was initially proposed in a notice of proposed rulemaking entered October 9, 1979, which is published at 44 Fed. Reg. 60122 and appears in Appendix E.

JURISDICTION

The judgment of the Court of Appeals, which was entered August 9, 1982, appears as Appendix F. An order of the Court of Appeals denying both rehearing and rehearing *en banc* on the basis of a timely suggestion for rehearing *en banc*, which order was entered September 22, 1982, appears as Appendix G. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Interstate Commerce Act appear as Appendix H. Pertinent provisions of the Code of Federal Regulations appear as Appendix I. The proposed ICC regulation at issue in this case appears as Appendix J.

STATEMENT OF THE CASE

Each year carriers publish and file thousands of tariffs setting forth new and changed rates for transportation service. The Interstate Commerce Act ("the Act") specifically prescribes the steps by which a carrier may implement a new or changed tariff rate. See 49 U.S.C. § 10762. This case involves an attempt by the Interstate Commerce Commission ("the ICC" or "the Commission") through regulation to exercise authority that it has not been granted over published tariff rates and to penalize carriers severely for failing to comply with one of the many technical requirements set forth in the ICC's own detailed tariff publication rules.

A. Carrier Tariff Filings and Past ICC Practice

Under the Act, carriers must file with the Commission tariffs setting forth their rates for transportation service.[2] Carriers must adhere strictly to their published rates so long as they remain in effect.[3] To change a tariff rate, carriers must file and send to tariff subscribers notice of the proposed change and its effective date.[4]

In addition to the Act's requirements, extraordinarily complex and detailed ICC regulations govern the publication and dissemination of tariffs. These regulations for rail freight tariffs alone take up almost seventy pages of the Code of Federal Regulations,[5] prescribing such details as the type of paper on which tariffs may be printed and the permissible width of columns appearing on a tariff page.[6] One of these regulations requires that any change reflected in a new tariff sheet be flagged by a designated symbol that indicates either a rate reduction or a rate increase or no change in the existing rate.[7]

From time to time, errors do occur in publishing tariffs so that a new tariff sheet may not always comply in every

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[2] See 49 U.S.C. § 10762(a).

[3] See, *e.g.*, *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-21 (1939); *Louisville & N.R.R.* v. *Maxwell*, 237 U.S. 94, 97-98 (1915).

[4] See 49 U.S.C. § 10762(c); 49 C.F.R. § 1300.30.

[5] See 49 C.F.R. § 1300.0, *et seq.*

[6] See 49 C.F.R. § 1300.1.

[7] See 49 C.F.R. § 1300.2(a). The regulation specifies that a diamond symbol shall be used to indicate an increase, a teardrop symbol to indicate a reduction, and a pyramid symbol to indicate no net change. *Id.*

detail with the Commission's numerous regulations, even though it sets forth a proposed rate change with perfect clarity. The Act permits the Commission to reject a proposed new tariff filing prior to its effective date where the tariff sheet contains some defect such as a typographical error or a missymbolization of a rate change.[8] Tariff rejection has generally been considered " 'a peremptory form of response to filed tariffs' " that is appropriately used to call "on the filing party to put its papers in proper form and order."[9] Historically, the Commission maintained a staff of tariff examiners who reviewed each new tariff sheet prior to its effective date; if some defect was discovered, the Commission rejected the tariff before it took effect, and ordinarily the carrier could then file a corrected tariff without suffering any significant adverse consequences.

In the event that a clerical or typographical error—such as missymbolization of a rate change—was discovered only after a tariff had become effective, the Commission's traditional practice was to advise the carrier of the error so that a corrected tariff could be published and filed, and to encourage the carrier to exercise all possible care in the future.[10] The Commission did not attempt to reject or otherwise to strike summarily effective tariffs containing technical defects; and it certainly did not at-

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[8] See 49 U.S.C. § 10762(e).

[9] *Municipal Light Boards* v. *FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); accord, *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 676 F.2d 1374, 1378 (11th Cir. 1982).

[10] See Joint Brief of the ICC and the United States in the court below, served November 6, 1981, at 6.

tempt to penalize carriers for inevitable clerical and typographical errors by making them refund to shippers rate increases collected under tariffs that were not necessarily perfect in every technical detail. To the contrary, the Commission has long recognized that it lacks authority to reject an effective tariff, and that a rate contained in an effective tariff must be observed unless it is shown to involve some substantive violation of the Act's provisions.[11]

Congress has specifically defined elsewhere in the Act the scope of the Commission's authority to overturn effective tariff rates. Thus, Section 10704 of the Act authorizes the Commission, on its own initiative or on complaint, to investigate any existing rate and to determine whether the rate is unreasonable or otherwise violates any other provision of the Act.[12] If, after investigation and a full hearing, the Commission finds an existing rate to be unlawful, it "may prescribe the rate . . . to be followed" in the future. 49 U.S.C. § 10704(a)(1).[13]

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[11] See, *e.g.*, *Phillips Petroleum Co.* v. *Akron, C. & Y. R.R.*, 308 I.C.C. 257, 260 (1959); *Heavy and Spec. Carriers Tariff Bureau* v. *U.S.A.C. Transport, Inc.*, 302 I.C.C. 487, 488 (1957); *Lamb-Fish Lumber Co.* v. *Yazoo & M.V.R.R.*, 42 I.C.C. 470, 471 (1916).

[12] See 49 U.S.C. § 11704(a)(1), (f).

[13] The Act also expressly restricts the Commission's authority to declare a rate unlawful. If a carrier does not possess "market dominance"—that is, if it faces effective competition from other carriers or other modes—with respect to the transportation to which the rate applies, the Commission may not set aside the rate as unreasonably high. See 49 U.S.C. 10709. And, even when market dominance does exist, the Act prescribes a range within which carriers may raise rates without challenge by either the Commission or private parties. See 49 U.S.C. § 10707a. Congress, in short, has not given the Commission unrestricted authority to set aside carriers' rates.

B. The ICC's New Tariff Regulation

While the ICC has long considered its authority to reject a tariff for some technical defect to be at an end once the tariff has become effective, in October 1979 the Commission issued a notice of proposed rulemaking that reflected a major change in its view of its authority over effective tariff rates. Pet. App. 5e-7e. The notice proposed a new tariff regulation that would provide that: "Changes resulting in increases which are not identified by proper symbols shall be considered unlawfully published and filed and therefore invalid and not collectible." Pet. App. 19e.[14] The notice acknowledged that the purpose of this new regulation was to render missymbolized rate increases invalid and uncollectible, "notwithstanding the passing of the purported effective date" of the increases. Pet. App. 7e. Thus, the Commission was asserting for the first time authority to reject a tariff rate increase for a purely technical defect of form—missymbolization—even after the increase had become effective.

In addition, the Commission's proposed regulation provided that in the case of a missymbolized rate increase,

> "the lawful provisions will be those which were purportedly superseded. Invalid provisions shall be cancelled by publication which shall bring forward, or properly amend, provisions which have remained in effect by reason of invalid publication." Pet. App. 19e.

The Commission thus sought to dictate that a missymbolized rate increase—even if entirely reasonable and nondiscriminatory as a substantive matter—should be

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[14] The notice also proposed a number of other new tariff publication regulations; these additional regulations are not at issue in this case.

treated as a nullity and that the applicable rate for all time should be the rate that was superseded. By so doing, the Commission intended to enable shippers to recover the full amount of any missymbolized rate increase, without regard to whether shippers had suffered any actual harm. Pet. App. 6e-7e.

In the notice, the Commission acknowledged that its proposed regulation represented "a departure from numerous Commission *and* court decisions in the past." Pet. App. 6e (emphasis added). The notice explained that because the Commission wished to "reallocate its resources," it planned shortly to reduce its tariff examination staff and "to review tariff filings on a random sampling basis only." Pet. App. 6e. The notice sought to justify the proposed regulation on the ground that "some tariff deficiencies previously discovered by the full complement of tariff examiners" might not be caught under the new "sampling net." Pet. App. 6e.[15]

After receiving comments, the Commission adopted the proposed regulation without change in an order dated August 14, 1980. Pet. App. 10c-16c. The Commission's order also acknowledged that the new regulation constituted a departure from past treatment of effective tariff rates. Pet. App. 10c-11c. Nonetheless, the Commission asserted that it had authority to issue the regulation under Section 10762 of the Act, 49 U.S.C. § 10762. See Pet. App. 33c. The Commission also reaffirmed its intent

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[15] The Commission asserted that "it would be inappropriate" to place the burden of checking new tariff filings for changes on tariff users (Pet. App. 6e), although tariff subscribers would certainly have notice that changes had been made by virtue of receiving new proposed tariff sheets (see p. 3, above).

that, when a rate increase is missymbolized, shippers are to be allowed to recover the full amount of the rate increase. Pet. App. 13c-14c. And the Commission made clear that such a refund claim could be brought as long as three years after the claim first accrues. Pet. App. 14c; see 49 U.S.C. § 11706(b).

The Commission's order also rejected suggestions that the new regulation, if adopted, should apply to rate reductions as well as to rate increases. Pet. App. 15c. Thus, the new regulation would operate only against carriers and never in their favor—missymbolized increases are to be deemed invalid, but missymbolized reductions are not.[16]

C. The Court of Appeals Proceedings

On petitions for review, the Court of Appeals for the Fifth Circuit sustained the ICC's new regulation invalidating missymbolized tariff increases.[17] The Court of Appeals rejected the argument that the Commission has no authority under Section 10762—whether by regulation or otherwise—to reject a tariff after it has taken effect. Noting that the symbolization requirement concerns "the form in which a tariff must be published and filed," the Court observed that "rejection is the remedy that agen-

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[16] The petitioners sought reconsideration of the Commission's decision to adopt the new regulation. By order dated June 10, 1981, the Commission summarily reaffirmed its action. Pet. App. 4d.

[17] The Court of Appeals' jurisdiction was invoked under 28 U.S.C. §§ 2321, 2342 & 2344.

cies commonly are empowered to use against tariff filings that are obviously 'defective in form.' " Pet. App. 9b. The court failed to perceive any limitation on the Commission's tariff rejection under Section 10762 (Pet. App. 10b), despite the fact that the ICC's authority over effective tariff rates is defined in a separate portion of the Act (see p. 5, above).

The Court of Appeals also held that the Commission could invalidate retroactively missymbolized rate increases that may be entirely reasonable as a substantive matter. Pet. App. 11b-20b. This step would render carriers strictly liable to shippers for refund claims in the full amount of the increases, without regard to whether the shippers had suffered any actual harm. The court acknowledged that this new rule of retroactive invalidity and strict liability "moves away from an impressive list of prior decisions by the Commission." Pet. App. 12b. But the court concluded that Section 10762 gives the ICC sufficient authority to adopt the new regulation. Pet. App. 15b, 24b.[18]

REASONS FOR GRANTING THE WRIT

The decision below, sustaining the ICC's new missymbolization regulation, conflicts with decisions of both

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[18] The Court of Appeals also held that the Commission's promulgation of the new regulation was neither arbitrary nor capricious. Pet. App. 20b-24b. The court recognized that the new regulation could impose an extremely harsh penalty on carriers—the refund of up to three years of revenues collected on the basis of an entirely reasonable rate increase—for a purely technical defect, namely, missymbolization of the tariff setting forth the increase. Yet, it dismissed this point with the assertion that such "problems reflect severity . . ., not caprice." Pet. App. 23b.

other courts of appeals and this Court. Until the Fifth Circuit's decision in this case, the courts of appeals had consistently held that the power to reject tariffs does not extend to *effective* tariffs; only recently, the Eleventh Circuit—contrary to the decision below—struck down on this basis another ICC tariff regulation that was a precursor of the regulation at issue here. In addition, this Court ruled long ago that an effective tariff cannot be treated as a nullity, and shippers allowed to reap windfall recoveries without regard to actual harm, because of purely technical defects in the tariff or the filing process.

These direct conflicts alone are sufficient to warrant plenary review by this Court. Furthermore, the questions presented by this case are of large and far-reaching importance. Carriers and shippers alike depend upon the reliability of tariffs that have been filed and become effective in accordance with the Act's express provisions. Carriers file thousands of tariff changes annually; and a single rate increase can represent millions of dollars in freight charges to shippers and revenues to carriers. The ICC's new regulation undermines the reliability of the tariff rate system and imposes potentially enormous financial liability on rail carriers at a time when Congress has made clear that the historically weak financial position of the rail industry should be strengthened, not impaired.

I. The Decision Below, by Holding That the ICC Has Authority to Reject Effective Tariff Increases, Conflicts with Prior Decisions of Other Courts of Appeals.

Until the decision below, it was recognized that a carrier's tariff could be rejected only *prior* to its taking effect. To set aside an already *effective* rate, the Commission was required to initiate a proceeding under Section 10704 of the Act, and make a finding of harm before

awarding damages. The courts had clearly established that the role of the tariff rejection power was limited to tariffs submitted but not yet effective.

Thus, in *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 676 F.2d 1374 (1982), the Eleventh Circuit struck down an ICC regulation that would have empowered an administrative board to reject a carrier's tariff for procedural defects—such as missymbolization—on complaints filed up to 60 days *after* the tariff had become effective. The ICC sought to sustain this regulation as a proper exercise of its Section 10762(e) tariff rejection power, but the court ruled—directly at odds with this case—that Section 10762(e) does not give the Commission authority "to reject or strike an *effective* tariff." See 676 F.2d at 1377 & n.10 (emphasis added). Referring to Section 10704 and related provisions, the court emphasized that "Congress set out in detail elsewhere in the Act the Commission's power" over effective tariffs. *Id.* at 1378.

In *Delta Air Lines, Inc.* v. *CAB*, 543 F.2d 247 (1976), the District of Columbia Circuit similarly construed the CAB's tariff rejection power under the Federal Aviation Act—whose rate provisions were modeled on the Interstate Commerce Act.[19] The CAB had purported to reserve authority to reject certain tariffs *after* they had become effective. The court of appeals, taking note of the established principle that tariff "rejection is a '"peremptory form of response to filed tariffs"' . . . used . . . for calling on the filing party to put its papers in proper form and order," ruled that "rejection is a

[19] See, *e.g.*, *Northeast Airlines, Inc.* v. *CAB*, 345 F.2d 662, 665-66 (5th Cir. 1965).

regulatory device properly used only *prior* to a tariff's effective date." *Id.* at 268 (emphasis in original; citation omitted). Just as the Interstate Commerce Act separately defines the ICC's authority over an effective rail carrier tariff, the *Delta Air Lines* court determined that the Federal Aviation Act allows the CAB to proceed with respect to an effective airline tariff "only" by way of "an investigation and hearing pursuant to section 1002"—the Federal Aviation Act counterpart to Section 10704. *Id.*

The limited role of the Commission's tariff rejection power is also supported by important policy considerations. If a tariff is rejected before taking effect, a carrier ordinarily may publish and file a corrected tariff without any serious adverse consequences for either itself or shippers. But once a tariff has taken effect, the situation changes materially: goods are shipped, revenues are collected, and business plans are formulated by carriers, shippers and customers based on the established and effective rates. Consequently, setting aside an effective rate may significantly affect the settled expectations and plans of many firms. Thus, it is with good reason that the Act defines the Commission's authority to set aside effective rates separately—in Section 10704—from its authority to reject summarily tariffs that have not yet taken effect.

The decision below ignores the difference in the Commission's authority over effective and proposed tariff rates,[20] and conflicts directly with the decisions in *South-*

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[20] The Court of Appeals' decision also ignores the limitations that exist on the Commission's authority over carrier rates. For example, the Act expressly provides that the Commission may not set aside a rate as unreasonably high when the carrier does not have "market dominance" with respect to the traffic to which the rate applies. See

ern Motor Carriers and *Delta Air Lines*.[21] While the court below attempted to distinguish both prior decisions, it was able to do so only by pointing to a difference without significance in the case of *Southern Motor Carriers*[22] and by completely ignoring the relevant portion of *Delta Air Lines*.[23] The conflict between the decision in this case and

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49 U.S.C. § 10709. Yet, if the decision below is sustained, the Commission will effectively be allowed to use its tariff rejection power to invalidate—for defects purely of form—effective rates that it is expressly precluded from invalidating as a substantive matter. This is an extraordinary result in view of Congress' efforts to restrict the Commission's authority to overturn carrier rate increases. See p. 5 n.13, above.

[21] Indeed, in adopting the new missymbolization regulation at issue here, the Commission expressly acknowledged that the regulation is merely "an expansion of principles . . . adopted" in the regulation added in *Ex Parte No. 367*, which the Eleventh Circuit struck down in *Southern Motor Carriers* subsequent to the ICC orders in this case. Pet. App. 14c.

[22] The Court of Appeals sought to distinguish *Southern Motor Carriers* on the ground that the regulation at issue there provided for only *informal* proceedings, whereas the present rule supposedly is enforceable on *formal* complaint and hearing. Pet. App. 11b n.6. As a practical matter, it appears highly unlikely that there will be many, if any, instances in which a hearing is warranted to apply the present regulation—a fact that the Commission itself acknowledged in its original notice of proposed rulemaking (Pet. App. 7e). But, in any event, nothing in Section 10762 makes the Commission's tariff rejection powers turn upon the formality or informality of the procedures employed; the Commission cannot exercise authority that it has not been given, whether it proposes to proceed formally or informally.

[23] The court below implies that *Delta Air Lines* turned entirely on a determination that the CAB lacked authority to reject tariffs on the particular grounds asserted in that case. Pet. App. 7b-9b. However, this reading completely ignores the *Delta Air Lines* court's explicit, independent determination (see 543 F.2d at 267-69) that the CAB's tariff rejection power—whatever the reason asserted for its exercise—does not extend to effective tariffs.

these prior decisions of other courts of appeals is real and potentially of far-reaching significance for the tariff rate system on which both carriers and shippers rely (see pp. 19-22, below). Such circumstances present the clearest possible case for plenary review by this Court on writ of certiorari. Cf. Rev. Rule 17.1(a), Sup. Ct. R.

II. The Decision Below, by Holding That Effective Tariff Rates May Be Treated as a Nullity for All Time, Conflicts with Prior Decisions of this Court.

When a tariff increase has been missymbolized, the Commission's new regulation directs that the increase shall be treated as a nullity and that the superseded rate shall be the applicable provision for all time. See p. 6, above. This extraordinary act of administrative legerdemain, which the decision below sustains (Pet. App. 11b-20b), directly conflicts with prior decisions of this Court—entirely apart from whether the Commission has authority to reject a tariff that has already taken effect. As the District of Columbia Circuit only recently recognized, this Court "long ago rejected the view" that an effective tariff on file with the Commission "should be disregarded or treated as non-existent merely because of some element of substantive unlawfulness in the rate . . . or some irregularity in the tariff filing formalities." *Genstar Chemical Ltd.* v. *ICC*, 665 F.2d 1304, 1308 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1750 (1982) (citations omitted).

In *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924), a shipper argued that the tariff charged him—which was admittedly unlawful because it violated the Act's long-haul short-haul provision[24]—should be treated as "non-

[24] Section 4 of the Act, now 49 U.S.C. § 10726.

existent" and that he should be allowed to recover on the basis of the lower rate charged favored shippers. This Court explicitly rejected the suggestion that a filed and effective tariff could be treated as "non-existent" (264 U.S. at 416, 422), holding that the shipper was entitled to recover only any actual damages he had suffered (*e.g.*, due to loss of business to a favored shipper or due to payment in excess of a reasonable maximum rate).

Similarly, in *Berwind-White Co.* v. *Chicago & E.R.R.*, 235 U.S. 371 (1914), this Court refused to allow a shipper to avoid liability to a carrier for demurrage charges on the premise that the tariff prescribing such charges was non-existent, even though the carrier allegedly had failed to comply strictly with the applicable tariff filing formalities. The Court emphasized that the tariff documents had been received and placed on file by the Commission (see 235 U.S. at 375), and thus there was an effective tariff that could not simply be ignored.[25]

If an effective tariff could automatically be treated as a nullity with retroactive effect for some procedural—or even substantive—defect, shippers might be able to obtain enormous windfall recoveries and carriers might be severly penalized, entirely without regard to whether any actual injury had occurred. This is precisely the effect that the ICC's new regulation would have by enabling shippers to recover the full amount of any missymbolized rate increase (see pp. 6-7, above). Such liability bears no

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[25] See also *Texas & P. Ry.* v. *Cisco Oil Mill*, 204 U.S. 449 (1907), where the Court held that a tariff could not be treated as a nullity because of the carrier's alleged failure to comply with the requirement (then contained in the Act) that published tariffs shall be posted for public inspection.

necessary relationship to harm suffered by shippers, since a missymbolized increase may be entirely reasonable and lawful as a substantive matter. Nonetheless, the Commission's new regulation would treat all missymbolized increases—however reasonable and nondiscriminatory they may be—as nullities and would not merely allow shippers to recover any actual damages but impose on carriers a private penalty in the full amount of the missymbolized increase.

It was the prospect of just such a private penalty that this Court found unsupportable under the Act in *Davis* v. *Portland Seed Co.*, *supra*. There, the Court emphasized that nowhere in the Act did Congress evidence an intent " 'that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government.' "[26] 264 U.S. at 418 (citations omitted). Accordingly, the Court held that the shipper in *Davis* was not entitled to a refund merely upon establishing the illegality of a rate, "without other proof of actual damage."[27] 264 U.S. at 415.

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[26] The Act expressly provides civil penalties for violation of the Commission's tariff publication regulations as well as for numerous other carrier violations. 49 U.S.C. § 11901(b). See generally 49 U.S.C. §§ 11901-02.

[27] Section 11705(b)(1) of the Act, 49 U.S.C. § 11705(b)(1), does authorize a shipper to recover "amounts charged that exceed the applicable rate for transportation or service" contained in a filed and effective tariff. However, as the District of Columbia Circuit only recently held, such overcharge liability does not authorize a court or the ICC to disregard a filed and effective tariff—as the Commission has sought to do in its present regulation. See *Genstar Chemical Ltd.* v. *ICC*, *supra*, 665 F.2d at 1308-10. Rather, Section 11705(b)(1) authorizes recovery of charges that "*exceed*" the filed and effective

Davis is only one of a series of decisions in which this Court has made clear that the Act provides no authority for what are in substance private penalty awards to shippers, calculated without regard to whether they have suffered any actual harm. Indeed, one of this Court's earliest decisions construing the Act established that "before any [private] party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury." *Parsons* v. *Chicago & N.W. Ry.*, 167 U.S. 447, 460 (1897).[2]

The decision below cannot be reconciled with this Court's prior decisions in *Davis* and *Berwind-White* or the precedent underlying them. Indeed, the Court of Appeals admitted that the Commission's new regulation seeks to invalidate "retroactive[ly]" missymbolized tariff rate increases and authorize shippers to obtain refunds without "any injury-in-fact prerequisite." Pet. App. 12b, 22b. The court's decision implies, however, that the ICC's effort to exercise such authority involves, at most, a departure from only a series of previous Commission decisions. Pet. App. 12b-15b. It is true that, with the present regulation, the Commission has turned its back on a long line of prior ICC precedent in which it has held that a filed and effective tariff may not be treated as non-existent and shippers awarded refunds without re-

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rate. See, *e.g.*, *United States* v. *Kansas City Ry.*, 116 F. Supp. 484, 488 (W.D. Mo. 1953), *vacated on other grounds*, 217 F.2d 763 (8th Cir. 1955).

[2] Accord, *e.g.*, *ICC* v. *United States*, 289 U.S. 385, 389 (1933); *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, 164-65 (1922); *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 204, 206 (1913).

gard to actual harm.[29] But, as the Commission itself acknowledged, the new regulation represents "a departure from numerous . . . court decisions" as well. See p. 7, above.[30]

The conflict that exists between the decision below and this Court's decisions constitutes a further compelling reason for plenary review by this Court on certiorari. Cf. Rule 17.1(c), Sup. Ct. R.

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[29] See, *e.g.*, *Shobe, Inc.* v. *Bowman Transport, Inc.*, 350 I.C.C. 664, 669-71 (1975); *Phillips Petroleum Co.* v. *Akron, C. & Y.R.R.*, *supra*, 308 I.C.C. at 260; *Bacon Bros.* v. *Alabama G.S.R.R.*, 263 I.C.C. 587, 590 (1945); *Chase & Co.* v. *Atlantic C.L.R.R.*, 220 I.C.C. 398, 400 (1937); *Dewey Portland Cement Co.* v. *Atchison, T. & S.F. Ry.*, 185 I.C.C. 233 (1932); *Greene Cananea Copper Co.* v. *Chicago, R.I. & P. Ry.*, 88 I.C.C. 225 (1924).

[30] The Court of Appeals did not even discuss the applicable prior decisions of this Court in holding that the Commission may treat filed and effective tariffs as nullities for all time; rather, the court cited only two lower court decisions in support of its conclusion. The principal decision, *Chicago, M., St. P. & P.R.R.* v. *Alouette Peat Products, Ltd.*, 253 F.2d 449 (9th Cir. 1957), dealt almost entirely with the issue whether a carrier has any liability at all for failing to comply with tariff implementation requirements imposed by the Act itself and gave only brief consideration to the appropriate remedy. *Id.* at 455-56. Another court of appeals has only recently refused to follow *Alouette Peat* in light of, among other things, this Court's decisions in *Davis* and *Berwind-White*. See *Genstar Chemical Ltd.* v. *ICC*, *supra*, 665 F.2d at 1309. The second decision cited by the court below, *Axinn & Sons Lumber Co.* v. *Long Island R.R.*, 466 F. Supp. 993, 996-97 (E.D.N.Y. 1978), merely treated *Alouette Peat* as controlling with regard to shippers' right to refunds in the context of a substantively invalid tariff filing.

III. The Questions Raised by the Decision Below Are of Exceptional Importance.

The questions presented by this case directly affect the integrity of the tariff rate system upon which carriers and shippers throughout the nation rely. The Act, by prescribing a detailed system of rate publication and strict adherence to effective published rates, seeks to foster certainty and stability in transportation markets. See, *e.g.*, *Boston & M.R.R.* v. *Hooker*, 233 U.S. 97, 112 (1914); *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, *supra*, 676 F.2d at 1378. The decision below, however, injects a whole new element of uncertainty into the tariff rate system for a purely technical defect, and with extremely serious potential financial consequences.

Each year thousands of tariff changes are published and filed by carriers. See *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 (1979). Once a rate increase reflected in such tariff filings becomes effective, carriers proceed to apply and collect the increase from shippers. Under the Commission's new regulation, however, it may be determined years after a tariff change has taken effect that a rate increase is not in fact valid and collectible solely because of an erroneous symbol and entirely without regard to the reasonableness of the increase as a substantive matter. Carriers and shippers alike will no longer be able to rely as they have in the past on effective published rates, and the resulting effect on transportation markets will inevitably be "unsettling." Cf. *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, *supra*, 676 F.2d at 1378-79.

Moreover, the financial impact on the nation's carriers could prove to be enormous. A single rate increase can involve tens of thousands of dollars in revenues daily; and

in the past the railroads have been presented with claims totaling millions of dollars as a result of a misplaced comma in the publication of general rate increases.[31] The present regulation does not touch merely a single rate increase or a single set of rates; rather, it would render carriers strictly liable for a three-year period for the full amount of each future tariff rate increase that does not bear the proper Commission prescribed symbol upon publication.

This is an extraordinary liability to impose on carriers for a clerical or typographical error—missymbolization—that the Commission's own tariff integrity board has previously described as a mere "technicality."[32] If shippers waited a full three years before objecting to a missymbolized rate increase,[33] the result could easily be the loss by carriers of tens of millions of dollars in badly needed revenues. Neither the Interstate Commerce Act nor Commission regulation provides any procedure by

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[31] See *Inclusion of Interstate Application of Authorized General Rate Increases*, 359 I.C.C. 295, 307 n.7 (1979), where the railroads received refund claims totaling $4.5 million and estimated potential liability at $25 million.

[32] See *Sea-Land Serv., Inc.* v. *Trans-Continental Freight Bureau*, served May 19, 1980, at 1 (I.C.C. T.I.B. No. 80-28).

[33] In fact, a particularly unfortunate consequence of the Commission's new regulation could be to encourage shippers not to provide prompt notice of symbolization errors of which they are aware but rather to do so only when the three-year limitations period for their refund claims (see p. 8, above) has almost run. Under the Commission's new regulation, each day that passes without the limitations period expiring would be another day for which the shipper would ultimately have to pay freight charges based only on the lower superseded rate and would never be subject to the increased rate, however substantively valid it might be.

which carriers may retroactively implement a rate increase that is perfectly lawful as a substantive matter, and thus retain revenues collected under an effective but missymbolized tariff increase invalidated pursuant to the Commission's new regulation.

The Commission's imposition of such potentially damaging strict liability is especially troubling in light of Congress' repeated efforts in recent years to compel the Commission to improve the rail industry's historically weak financial position. With increasing specificity, Congress has directed the Commission to consider the revenue needs of rail carriers and enable carriers to earn sufficient revenues to cover their costs and to provide them with an adequate return to attract new capital.[34] The Commission's present regulation, however, works directly against this important, congressionally declared policy of revenue adequacy for rail carriers: whether or not a rate increase is entirely justified in terms of carriers' revenue requirements, the regulation expressly prescribes that the increase is "invalid and not collectible"—and that the lower "superseded" rate shall in fact apply—whenever a tariff rate increase is missymbolized.[35]

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[34] See Act of Feb. 5, 1976, Pub. L. No. 94-210, § 205, 90 Stat. 41, *now codified in* 49 U.S.C. § 10704(a)(2); Act of Oct. 14, 1980, Pub. L. No. 96-448, tit. II, § 201(a), 94 Stat. 1898, *codified in* 49 U.S.C. § 10701a(3).

[35] This extreme result is not required to protect any legitimate interest of shippers; the Act expressly affords a remedy for any actual substantive harm suffered by a private party as a result of a carrier initiated tariff rate increase. See 49 U.S.C. § 11705(b)(2). Nor can the regulation reasonably be justified as necessary to coerce carriers to exercise due care in preparing and publishing tariff sheets

In short, the decision below, sustaining this new ICC regulation, presents the very sorts of questions "of obvious importance" that this Court has traditionally considered appropriate for exercise of its certiorari jurisdiction. Cf. *FPC* v. *Texaco Inc.*, 417 U.S. 380, 383 (1974). They are important in terms of the structure of the Act because they bear upon the basic division between the more summary procedures applicable to tariffs prior to their taking effect and the different plan specifically articulated for effective tariff rates; and they are practically important because of the enormous potential liability that the Commission's new approach imposes upon the hard-pressed rail industry. When these factors are considered together with the direct conflicts that exist with prior decisions of both this Court and other courts of appeals, there should be no doubt that this case warrants plenary review by the Court.

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setting forth rate increases; the Act gives the Commission ample authority to impose specific civil penalties for any violation of its tariff publication regulations. See 49 U.S.C. § 11901(b).

CONCLUSION

For the reasons stated, certiorari should be granted and the case set for plenary review by this Court.

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October 1982

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